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COHN AND MARKS

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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October 9, 1998

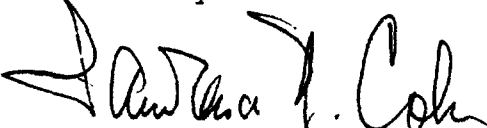
Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Dear Ms. Salas

On behalf of Heftel Broadcasting Corporation, there is herewith submitted and original and four (4) copies of its Request to Refer Petition for Partial Reconsideration to the Commission (MM Docket Nos. 97-26 and 97-91.)

Please direct any communications regarding this filing to the undersigned counsel.

Sincerely


Lawrence N. Cohn

cc: See Certificate of Service

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OCT - 9 1998

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Federal Communications Commission

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 97-26
Table of Allotments,)	RM-8968
FM Broadcast Stations.)	RM-9089
(Detroit, Howe and Jacksboro,)	RM-9090
Texas, Antlers and Hugo, Oklahoma))	
)	
In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 97-91
Table of Allotments,)	RM-8854
FM Broadcast Stations.)	RM-9221
(Lewisville, Gainesville, Robinson,)	
Corsicana, Jacksboro, and Mineral)	
Wells, Texas)	
)	
To: Chief, Allocations Branch		
Policy and Rules Division		
Mass Media Bureau		

REQUEST TO REFER PETITION FOR PARTIAL RECONSIDERATION TO THE COMMISSION

Heftel Broadcasting Corporation ("Heftel"), by its counsel, hereby requests that the Allocations Branch of the Policy and Rules, Division of the Mass Media Bureau ("Allocations Branch"), pursuant to Sections 1.104(b) and 1.106(a)(1) of the Commission's rules, refer the Petition for Partial Reconsideration which Heftel filed with the Allocations Branch on September 21, 1998 (copy

pursuant to Sections 1.104(b) and 1.106(a)(1) of the Commission's rules, refer the Petition for Partial Reconsideration which Heftel filed with the Allocations Branch on September 21, 1998 (copy attached), and all related pleadings, to the full Commission for consideration. In support, the following is stated.

On September 21, 1998, Heftel filed a Petition for Partial Reconsideration of the decision of the Allocations Branch in Report and Order (DA 98-1650; released August 21, 1998) ("Report and Order") in the above-referenced proceeding. On September 21, 1998, Jerry Snyder and Associates, Inc. ("Snyder") filed an Application for Review of the Report and Order with the full Commission, and on September 24, 1998, Metro Broadcasters-Texas, Inc. ("Metro") filed a separate application for Review of the Report and Order with the full Commission.^{1/}

^{1/} Heftel is today filing with the Commission its Consolidated Opposition to the Applications for Review filed by Snyder and Metro.

Ordinarily consideration of an application for review is deferred when a petition is filed seeking reconsideration of the same action. However, we submit that in order to obtain the most efficient and prompt resolution of the matters raised by all the parties in their pleadings, and in order to conserve administrative resources, it would be best if all the pleadings relating to the status of the Report and Order were considered by the full Commission. Since Snyder and Metro have sought consideration of this matter by the full Commission, Heftel believes that its Petition for Partial Reconsideration (and all pleadings related thereto)^{2/} should be referred to and be considered by the full Commission in conjunction with the pending Applications for Review filed by Snyder and Metro. Section 1.106(a)(1) of the rules specifically permits designated authorities to refer petitions for reconsideration to the full Commission.

^{2/} Snyder and Metro have each filed Oppositions to Heftel's Petition for Partial Reconsideration.

Accordingly, Heftel hereby requests that the Allocations Branch, under its authority in Section 1.106(a)(1) of the Commission's rules, refer Heftel's Petition for Partial Reconsideration and all pleadings related thereto to the full Commission.

Respectfully submitted

Heftel Broadcasting Corporation

A handwritten signature in black ink, appearing to read "Roy R. Russo", is written over a horizontal line.

Roy R. Russo

Lawrence N. Cohn

COHN AND MARKS

1920 N Street, N.W., Suite 300

Washington, D.C. 20036

(202) 293-3860

Its Attorneys

Dated: October 9, 1998

BEFORE THE

Federal Communications Commission

In the Matter of)	
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Amendment of Section 73.202(b),)	MM Docket No. 97-26
Table of Allotments,)	RM-8968
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(Lewisville, Gainesville, Robinson,)	
Corsicana, Jacksboro, and Mineral)	
Wells, Texas))	

To: John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Petition for Partial Reconsideration

Heftel Broadcasting Corporation ("Heftel"), parent of the permittee of Station KECS(FM), Gainesville, Texas, and parent of the licensee of Station KDXX-FM (formerly KICI-FM), Corsicana, Texas^{1/}, by its

^{1/} Heftel is the parent of KECS-FM License Corp., permittee of Station KECS, and of KICI-FM License Corp., licensee of Station KDXX-FM.

attorneys, pursuant to Section 1.106 of the Commission's Rules, hereby petitions for reconsideration, in part, of the Report and Order in MM Docket Nos. 97-26 and 97-91, DA 98-1650 (released August 21, 1998) (hereafter "Report and Order"). In support thereof, Heftel states the following.

I. Background

The genesis of the Report and Order was the Commission's Notice of Proposed Rule Making and Order To Show Cause in MM Docket No. 97-91 ("NPRM"), 12 FCC Rcd 3059 (1997), which was issued pursuant to a Petition for Rule Making filed by Heftel in July 1996. The NPRM proposed the following changes in the Commission's FM Table of Allotments (Section 73.202(b) of the Rules): (1) the substitution of Channel 300C1 for Channel 300C2 for Heftel's Station KECS (permit only) at Gainesville, Texas, and the reallocation of Channel 300C1 to Lewisville, Texas, (2) the substitution of Channel 300A for Channel 300C1 for Heftel's Station KDXX-FM at Corsicana, Texas, and the reallocation of Channel 300A to Robinson, Texas, and (3) the substitution of Channel 241C3 for Channel 241C1 for Station KYXS, Mineral Wells, Texas, licensed to Jerry Snyder and Associates ("Snyder"), which currently operates on Channel 241C3. The change

from Channel 241C1 to Channel 241C3 at Mineral Wells was necessary to accommodate a change from Channel 299A to Channel 237A for Station KJKB at Jacksboro, Texas, which, in turn, was required to accommodate the allocation of Channel 300C1 at Lewisville.

Heftel filed Comments in support of the NPRM. Snyder, who has pending before the Commission an application to upgrade Station KYXS to operate on Channel 241C1 at Mineral Wells, (i.e., BPH-961125IG) filed Comments in opposition to the NPRM. However, on February 18, 1998, Heftel and Snyder filed Joint Reply Comments with the Commission which reflected that the parties had entered an agreement which contemplated that Snyder would amend its pending application to operate on Channel 241C1 to specify a different site which would be consistent with all the other proposals in the NPRM. The Agreement disclosed that Heftel would pay Snyder unspecified consideration in return for Snyder's agreement to amend its pending application in a manner which was consistent with the other aspects of the rulemaking proposal.

In the Report and Order, the Commission's approved the channel allocations proposed by Heftel for Gainesville/Lewisville and Corsicana/Robinson. Although the Commission approved the basic

agreement between Heftel and Snyder, it concluded (contrary to the position taken by Heftel and Snyder in their Joint Comments) that Snyder's application was the "functional equivalent" of a counterproposal in the rulemaking proceeding, and held that the payment limitation of Section 1.420(j) of the Commission's rules relating to the "dismiss[all] or withdraw[all]" of an "expression of interest" applied to the agreement between Heftel and Snyder. Report and Order, Paragraphs 12-13. Accordingly, the Report and Order specified that before Heftel's Lewisville and Robinson stations could commence program test operations, Heftel and Snyder were required to file certifications pursuant to Section 1.420(j) of the Commission's Rules. The Report and Order further specified that, as a condition precedent to commencement of program test operation, Snyder would have to have granted an application to utilize Channel 241C1 which was consistent with Paragraph 15(b) of the Report and Order which modified the allotment for Station KJKS at Jacksboro from Channel 299A to Channel 237A.

II. Showing re: "Changed Circumstances" and Requested Relief

Subsequent to the release of the Report and Order, Heftel and Snyder, and their respective counsel, attempted to revise their

agreement in a way which was both satisfactory to the parties and consistent with the Report and Order and Section 1.420(j) (as interpreted by the Report and Order). These negotiations were not successful. Therefore, Heftel and Snyder have terminated their agreement. Because of this change of circumstances (i.e., the termination of the Heftel-Snyder agreement upon which the Report and Order was based), Heftel is submitting this Petition for Partial Reconsideration pursuant to Section 1.106(b)(3) of the Commission's rules.

Heftel asks the Commission to modify the Report and Order in two important respects as the result of the termination of the Heftel/Snyder agreement. It requests that the Commission change the allotment for Snyder's Station KYXS at Mineral Wells from Channel 241C1 to Channel 241C3 as requested in Heftel's Petition for Rule Making); and, concomitantly, it requests the Commission to eliminate the requirement that Snyder must be granted an application on Channel 241C1 which is consistent with the allotment of Channel 237A for Station KJKS at Jacksboro, Texas, before program test authority will be authorized for Heftel's Station KECS at Lewisville and Station KDXX-FM at Robinson, Texas. Of course, since there is no longer any agreement between Heftel and Snyder

regarding the amendment of Snyder's pending application to upgrade Station KJKS to Channel 241C1 at Mineral Wells, the requirement in the Report and Order requiring that Heftel and Snyder file Section 1.420(j) statements is moot.

III. Argument

Heftel asks the Commission to issue a revised Report and Order which reflects a continuation of the process commenced in the initial Report and Order--namely, the evaluation of the public interest benefits of Heftel's proposal with the other proposals advanced in this rule making proceeding based on their respective public interest merits^{2/} as statutorily required by Section 307(b) of the Commission Act, as amended.

Two parties filed counterproposals by the May 5, 1997 comment date specified in the NPRM--Metro-Broadcasters Texas, Inc. ("Metro") and Snyder. Although the Commission dismissed the Metro counterproposal on procedural grounds (Report and Order, Paragraph

^{2/} The FM allotment priorities are as follows: (1) first full time aural service; (2) second full time aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

6), it compared the public interest benefits of Metro's proposal with the benefits of Heftel's proposal and determined that the public interest benefits of Heftel's proposal are far superior to those of the Metro proposal. See Report and Order, Paragraph 7. The Mass Media Bureau has already determined that Snyder's pending application to upgrade Station KYXS to Channel 241C1 will be treated as a counterproposal in MM Docket No 97-91. See FCC Public Notice dated January 28, 1998 (Attachment hereto). In the same vein, the Report and Order (Paragraph 12) that Section 1.420(j) of the Rules was applicable to the Heftel/Snyder agreement because Snyder's application was the "functional equivalent" of a counterproposal in this rule making proceeding, the Commission must, in accordance with the directive of Section 307(b), now compare the public interest benefits of Heftel's proposal with those of Snyder's proposal, i.e., those in BPH-961125IG.

It is not difficult to compare the public interest benefits of the Heftel and Snyder proposals. In the Report and Order (Paragraph 7), the Commission determined that adoption of Heftel's proposal would provide net service gain to approximately 3,248,422 persons, and would provide a first local service to the community of Lewisville, Texas (population of 46,521) and a first local service

to the community of Robinson, Texas (population of 7,111). Even accepting Snyder's proposed claims relating to increased coverage, the public benefits of Snyder's proposal to operate Station KYXS as a Class C1 facility as proposed in its pending application do not remotely compare with those of Heftel's proposal. Of course, because Snyder's Station KYXS will remain licensed to Mineral Wells, its proposal will not bring a first (or second) local service to any community. Heftel's proposal is, therefore, unquestionably and materially superior to Snyder's proposal.^{3/}

Accordingly, the Commission should reconsider the decision reached in the Report and Order and approve the reallocation of FM allocations as proposed by Heftel in its July 1996 Petition for Rule Making and as set forth by the Commission in the NPRM. Specifically, the Commission should revise the Report and Order to

^{3/} Heftel's proposal is not only superior to Snyder's proposal, it is superior to Snyder's proposal and Metro's proposal taken together. However, since the Commission correctly dismissed Metro's proposal on procedural grounds, there is no need for the Commission to expressly evaluate the Heftel proposal vis-a-vis the combined proposals of Snyder and Metro.

amend the FM Table Allotments (Section 73.202(b) of the rules) as follows:^{4/}

	<u>Channel No.</u>	
<u>City</u>	<u>Present</u>	<u>Proposed</u>
Lewisville, TX	--	300C1
Gainesville, TX	233C, 300C2	233C
Robinson, TX	--	300A
Corsicana, TX ^{5/}	300C1	--
Jacksboro, TX	229A, 299A ^{6/}	229A, 237A
Mineral Wells, TX	240C1	240C3 ^{7/}

The foregoing changes in the FM Table of Allotments should be conditioned only on the "standard" conditions in such proceedings--

^{4/} These proposed changes in the FM Table of Allotments are the ones which are the subject of MM Docket No. 97-91, and are of immediate concern to Heftel. Heftel takes no position regarding the other changes in the FM Table of Allotments as proposed in the Report and Order as the result of MM Docket No. 97-26 (except insofar as they are required to effectuate MM Docket No. 97-91 as set forth above).

^{5/} Presumably due to oversight, the Paragraph 14 ordering clause in the Report and Order makes no reference to Corsicana, from which the Commission expressly intended to delete Channel 300C1. This administrative error should be corrected by the Commission on reconsideration.

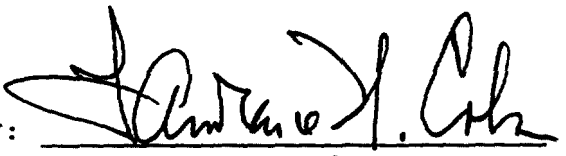
^{6/} Hunt has filed an application (BPH-980618IC) to upgrade Station KJKS from Channel 299A to Channel 299C3 at Jacksboro. Heftel has filed an Informal Objection to the Hunt application noting that the application was filed in an untimely manner and is inconsistent with the Report and Order.

^{7/} The Commission should also change the reference point for Station KYXS(FM) from NL 32-41-06; WL 98-09-32, as specified In the Matter of Amendment of Section 73.202(b), Table of Allotments, for Broadcast Stations (Mineral Wells and Winters, Texas, 7 FCC Rcd 1991 (Allocations Branch, 1992), to the current site of the station's tower/transmitter.

e.g. see Report and Order, Paragraphs 15(a) and (c). With the above-requested change in the allotment for Station KYXS, Mineral Wells, from Channel 241C1 to Channel 241C3, the provision in the Report and Order that conditions program test authority for Heftel's Lewisville and Robinson stations on the grant of an accommodating Station KYXS application on Channel 241C1 is moot and should be deleted. Similarly, the requirement that Heftel and Snyder file Section 1.420(j) statements is moot and should be deleted.

Respectfully submitted

HEFTEL BROADCASTING CORPORATION

By: 
Lawrence N. Cohn

COHN AND MARKS
1920 N Street, N.W.
Suite 300
Washington, DC 20036-1622
(202) 293-3860

Its Counsel

Dated: September 21, 1998

CERTIFICATE OF SERVICE

I, Cecy Ivie, an Administrative Assistant in the law firm of Cohn and Marks, hereby certify that on the 21st day of September, 1998, copies of the foregoing "Petition for Partial Reconsideration" were hand delivered or mailed first-class, postage prepaid, to the following:

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Allocations Branch
Mass Media Bureau
2000 M Street, N.W.
Fifth Floor
Washington, DC 20554

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Fletcher, Heald & Hildreth, P.L.C.
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Rosslyn, VA 22209-3801
(Counsel to Metro Broadcasters-
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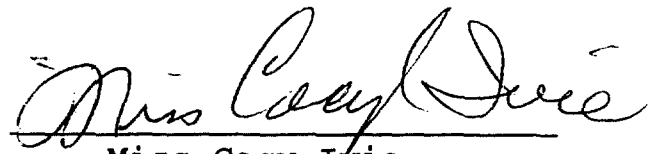
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Miss Cecy Ivie



PUBLIC NOTICE

Federal Communications Commission
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Washington, D.C. 20554

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REPORT NO. 2251

January 28, 1998

OFFICE OF PUBLIC AFFAIRS
REFERENCE OPERATIONS DIVISION
PETITIONS FOR RULEMAKING FILED

81543

(Interested persons may file statements opposing or supporting the Petitions for Rulemaking listed herein within 30 days. See Section 1.4 and 1.405 of the Commission's Rules for further information).

RM NO.	RULES SEC.	PETITIONER	DATE REC'D	NATURE OF PETITION
9221*	73.202(b)	Jerry Snyder and Associates, Inc. P. O. Box 638 Mineral Wells, TX 76067 (Filed by Robert W. Healy, Attorney Smithwick & Belendiuk 1990 M Street, N.W. Suite 510 Washington, D.C. 20036)	11-25-96	Application for a New Construction Permit filed by Station KYXS (FM) for Channel 240C1 at Mineral Wells, Texas (BPH 961125IG), at coordinates 32-39-35; 98-09-34. This application is being considered as a counterproposal in MM Docket No. 97-91 which proposes the substitution of Channel 300C1 for Channel 300C2 at Gainesville, Texas; the reallocation of Channel 300C1 to Lewisville, Texas; the modification of Station KECS (FM)'s construction permit; the substitution of Channel 300A for Channel 300C1 at Corsicana, Texas; the reallocations of Channel 300A to Robinson, Texas; the modification of Station KICI (FM)'s license accordingly; the substitution of Channel 237A for Channel 299A at Jacksboro, Texas; and the substitution of Channel 240C3 for Channel 240C1 at Mineral Wells, Texas.

BEFORE THE

Federal Communications Commission

In the Matter of)	
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Amendment of Section 73.202(b),)	MM Docket No. 97-26
Table of Allotments,)	RM-8968
FM Broadcast Stations.)	RM-9089
(Detroit, Howe and Jacksboro,)	RM-9090
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(Lewisville, Gainesville, Robinson,)	
Corsicana, Jacksboro, and Mineral)	
Wells, Texas))	

To: John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Errata

Heftel Broadcasting Corporation ("Heftel") hereby submits this Errata with regard to the Petition for Partial Reconsideration ("Petition") which Heftel filed with Commission on September 21, 1998, in the above captioned proceeding.

At several places, the Petition refers to Station KYXS-FM, Mineral Wells, Texas, licensed to Jerry Snyder and Associates, Inc., as operating on Channel 241C3 and having a pending application (BPH-961125IG) for an upgrade to allow operation on Channel 241C1. The correct references are to Channel 240C3 and to Channel 240C1, respectively.

Respectfully submitted

HEFTEL BROADCASTING CORPORATION

A handwritten signature in cursive script, appearing to read "Lawrence N. Cohn", is written over a horizontal line.

Lawrence N. Cohn

COHN AND MARKS

1920 N Street, N.W., Suite 300
Washington, DC 20036-1622
(202) 293-3860

Its Attorneys

Date: September 29, 1998

CERTIFICATE OF SERVICE

I, Cecy Ivie, an Administrative Assistant in the law firm of Cohn and Marks, hereby certify that on the 29th day of September, 1998, copies of the foregoing "Errata" were hand delivered or mailed first-class, postage prepaid, to the following:

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Mass Media Bureau
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(Counsel to Metro Broadcasters-
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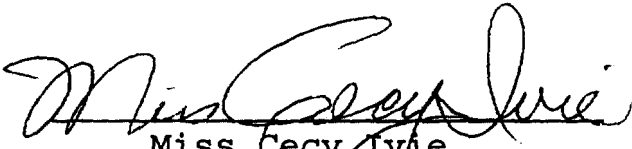

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(Counsel to Great Plains
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Miss Cecy Ivie


CERTIFICATE OF SERVICE

I, Linda Stewart, an Administrative Assistant in the law firm of Cohn and Marks, do hereby certify that true and correct copies of the foregoing REQUEST TO REFER PETITION FOR PARTIAL RECONSIDERATION TO THE COMMISSION were mailed, first-class postage prepaid, this 9th day of October, 1998 to the following:

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Allocations Branch
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Linda Stewart